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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-

GREAT LAKES DREDGE & DOCK COMPANY, INC.,
Petitioner,

v.

DEBORAH FURKA,
Administratix of the Estate of PAUL FURKA, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in twice reversing jury verdicts based on instructions that the conduct of would-be maritime rescuers and their perception of the need to rescue must be judged by the standard of a reasonably prudent person under like circumstances when

(1) those instructions correctly followed precedent;
(2) the "wanton or reckless" standard adopted on appeal for judging perception conflicts with public policy; and
(3) neither issue was preserved for appeal?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Great Lakes Dredge & Dock Company, Inc. (hereinafter Great Lakes),[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 4, 1987.

[1] Great Lakes Dredge & Dock Co. is a subsidiary of Great Lakes International, Inc., which is a subsidiary of Itel Corporation, Inc. Other subsidiaries of Great Lakes International are Henry DuBois' Sons Company, Inc., Western Quarries and Construction Company, North American Trailing Company (NATCO), Lydon Dredging & Construction Company, Ltd., Great

OPINIONS BELOW

On February 21, 1983, at the conclusion of a five-day jury trial, the jury found defendant Great Lakes negligent, found plaintiff's decedent Paul Furka 65 percent contributorily negligent and assessed damages at $1,200,000. On May 6, 1983, judgment was entered for $420,000. App. 1-2.[2]

On appeal, the judgment was reversed by the United States Court of Appeals for the Fourth Circuit. 755 F.2d 1085 (4th Cir. 1985); App. 3 (hereinafter *Furka I*). Following a denial of its Petition for Rehearing, Great Lakes filed a Petition for Writ of Certiorari, which was denied on October 7, 1985. 474 U.S. 846 (1985).

At the conclusion of the second trial in June, 1986, a jury found that a rescue situation was not present at the time of Paul Furka's death. 824 F.2d at 331; App. 18. On June 12, 1986, judgment was entered for Great Lakes. App. 13. By Memorandum to Counsel of August 28, 1986, District Judge J. Frederick Motz noted that the actual effect of the jury verdict was judgment for Mrs. Furka in the amount of $420,000. App. 14.

On appeal, the judgment was again reversed by the United States Court of Appeals for the Fourth Circuit on August 4, 1987. 824 F.2d 330 (4th Cir. 1987); App. 16 (hereinafter *Furka II*). Great Lakes filed a timely Petition for Rehearing, which was denied by Order dated September 4, 1987. App. 21.

Lakes Nederland, B.V., Great Lakes Argentina S.A., Tidewater Dredging Corporation, Dodge Island Corporation, and Fifty-Three Dredging Corporation. Great Lakes International is also a joint venturer in the following groups: Polar Constructors and GLCFB, Joint Venture. Other subsidiaries of Itel Corporation, Inc. are Itel Container, Itel Rail, and Anixter Brothers, Inc.

[2] References to material in the Appendix to this Petition are designated "App. ____."

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment below and remanding the matter for new trial, was dated August 4, 1987.

The Order of the United States Court of Appeals for the Fourth Circuit denying Great Lakes's Petition for Rehearing was entered on September 4, 1987. This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED

1. The Jones Act, 46 U.S.C. 688 (1982):

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Paul Furka was employed by Great Lakes as chief of a surveying team on a large marine construction project in the Chesapeake Bay near Baltimore. *Furka I*, 755 F.2d at

1087; App. 4. On January 9, 1982, Furka boarded a Boston Whaler[3] and proceeded out in deteriorating weather to a large scow which was then adrift because its attending tug had broken down. When Furka arrived at the scow, the scowman declined his offer of a ride. *Id.* Furka then headed back aboard the Whaler. A few minutes later, Furka radioed to report that he was taking on water and was not going to make it. *Id.* Furka was not heard from again. His body was recovered several weeks later.

Mrs. Furka subsequently filed suit in the United States District Court for the District of Maryland, alleging negligence under the Jones Act and unseaworthiness under the General Maritime Law. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1333 (1982). At both trials, considerable testimony was adduced concerning Furka's motives in proceeding out to the scow. Mrs. Furka maintained that her husband went out to rescue the crewman on the scow, believing that he was "freezing to death." *Furka I*, 755 F.2d at 1087; App. 4. Great Lakes denied that Furka believed an emergency existed. Rather, it maintained that Furka merely went out to bring the scowman in out of the cold, A. 221-24,[4] and to have him ready for an upcoming crew change. A. 88-89, 96-97.

At the completion of testimony in *Furka I*, the jury was charged that contributory negligence was "a failure on the part of the plaintiff himself to use ordinary care under the circumstances for his own safety at the time and place in question." *Furka I*, 755 F.2d at 1088 n.5; App. 6. Applying this standard to the evidence, the jury found Furka 65% contributorily negligent. On appeal, the Fourth Circuit reversed, holding that the contributory negligence charge constituted "plain error," since a maritime rescuer

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[3] This Boston Whaler was a 16-foot open, flat bottomed fiberglass boat, powered by a 35 horsepower outboard motor.

[4] Citations to the Joint Appendix filed in the Fourth Circuit in *Furka I* are designated "A. _____."

could not be faulted unless his conduct was "wanton or reckless." *Id.* at 1088; App. 6.

On retrial, the key issue was whether Furka was engaged in a "rescue situation" at the time of his death, since absent such a finding Furka's conduct would not be judged by the higher standard mandated by *Furka I*. The trial judge charged that in determining that issue the jury should consider whether a "reasonably prudent person" would have perceived a need to rescue "based on all the surrounding circumstances." *Furka II*, 824 F.2d at 331; App. 18. The jury found that a rescue situation was not present. On appeal, the Fourth Circuit again reversed, holding that the same "wanton or reckless" standard applied to conduct in *Furka I* was the proper standard for judging perception of the need to rescue. *Id.* at 332; App. 20.

REASONS FOR GRANTING THE WRIT

The opinions below defy logic and deny fundamental fairness by affording protection to unreasonable perceptions and conduct and by rejecting the determinations of two juries. Although purporting to protect seamen in rescue situations, the Fourth Circuit has accomplished just the opposite by creating a rule which protects those needlessly leading others into deadly peril. And it does so in the face of clear and unflinching precedent to the contrary.

In *Furka* II, the Fourth Circuit cites not one authority in support of its outlandish formulation. It could not have; every case considering the perception of would-be rescuers comports completely with the instructions given by the trial court. Even more astoundingly, the Court of Appeals reversed on each occasion despite plaintiff's failure to preserve the issue for appeal.

While the errors below are reason enough, important principles beyond fundamental fairness require that this case be reviewed. The Fourth Circuit has established a new rule

of federal maritime law which threatens to cause untold confusion, to upset delicately balanced public policy, and to undermine the uniformity which has long been a hallmark of this Court's consideration of maritime cases.[5] Action thus is needed not only to correct the injustice below but also to set back on course a maritime rule gone aground.

I. The Decisions Below Directly Conflict With Decisions Of Other Courts Of Appeal And State Courts Of Last Resort Regarding The Rescue Doctrine.

By rejecting the "ordinary care under the circumstances" standard for judging the conduct of maritime rescuers in *Furka I*, the Fourth Circuit placed itself directly in conflict with *Hlodan v. Ohio Barge, Inc.*, 611 F.2d 71 (5th Cir. 1980). Hlodan was a Jones Act seaman who drowned while attempting to rescue a deckhand from an assisting tug. The Fifth Circuit agreed that the district court had "properly delineated the requirement for Hlodan's conduct under the rescue doctrine to be that of an 'ordinarily prudent person under the circumstances.' " *Id.* at 73. In *Asaro v. Parisi*, 297 F.2d 859 (1st Cir.), *cert. denied*, 370 U.S. 904 (1962), the First Circuit applied the same standard in assessing whether a maritime rescuer was contributorily negligent:

> The fact that one acts in an emergency he has not caused, even to save another from danger, is only a factor or circumstance to be considered in determining due care, it being quite naturally assumed that the ordinary man of average prudence would not and could not reasonably be expected to act under tension with the

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[5] This Court has endeavored to develop maritime law as "a system of law co-extensive with and operating uniformly in the whole country." The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 401-02 (1970).

> same care, forethought and deliberation as ought to be expected of such a person when not acting under stress.

Id. at 861-62.

In *Furka II,* the Fourth Circuit extended its endorsement of the "wanton or reckless" standard beyond the conduct of a maritime rescuer to the would-be rescuer's perception of the need to rescue. In so doing, the Fourth Circuit rejected the trial court's instruction that the perception must be reasonable based on all the surrounding circumstances.

While there has been little specific discussion in maritime cases of the standard for determining whether, in fact, an emergency exists, the issue has arisen in litigation under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1982). The Jones Act, 46 U.S.C. § 688 (1982), upon which Mrs. Furka based her action for negligence, incorporates the FELA. The two acts must be interpreted and administered uniformly. *See Kernan* v. *American Dredging Co.,* 355 U.S. 426, 439 (1958).

FELA case law has long held that perceptions of emergency must be reasonable. *Sandri v. Byram,* 30 F.2d 784 (6th Cir. 1929), for example, involved a railroad employee who jumped to his death from a motorcar in the belief that it was about to collide with an approaching automobile. In fact, no collision occurred and the deceased would not have been injured had he remained on board the motorcar. In analyzing decedent's perception of the situation, the Sixth Circuit characterized the proper inquiry as whether there existed "what would have seemed, to an ordinarily prudent person, situated as [the decedent] was, an impending peril . . . ." *Id.* at 786.[6] *See also New York Cent. R. Co. v.*

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[6] At issue in *Sandri* was not contributory negligence but whether the plaintiff's conduct in responding to a perceived emergency broke the chain of causation of defendant's underlying negligence. While the setting is thus somewhat different, the policy considerations concerning perception of peril are the same.

Brown, 63 F.2d 657 (6th Cir.), *cert. denied*, 290 U.S. 634 (1933).

Moreover, state courts of last resort have uniformly adopted the requirement that a rescuer's perception of peril be reasonable.[7] *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850, 855 (1987); *Commonwealth v. Millsaps*, 232 Va. 502, 352 S.E.2d 311, 314 (1987); *See also Zimny v. Cooper-Jarrette, Inc.*, 8 Conn. App. 407, 513 A.2d 1235, 1239-40, *cert. denied*, 201 Conn. 811, 516 A.2d 887 (1986). The law requires, "as a prerequisite to the application of the rescue doctrine, at least a reasonable appearance to the rescuer that some person is actually in imminent and serious peril of personal injury or death." *Commonwealth v. Millsaps*, 352 S.E.2d at 314. Black-letter law is in accord. *See* Restatement (Second) of Torts § 472 (1965); 57 Am. Jur. 2d *Negligence* § 420, at 839-40 (1971); 65A C.J.S. *Negligence* § 124, at 84-85 (1966); L. Frumer & M. Friedman, *Personal Injury—Actions, Defenses, Damages* § 1.03, at 31 (1986). Annot., 158 A.L.R. 189, 193-94 (1945). Thus, the decisions below conflict with the development of rescue doctrine standards, whether in the maritime context or ashore.

The Fourth Circuit did not err merely by rejecting proper instructions, however. It established rules for analyzing the perception and conduct of maritime rescuers which smack of punitive damage standards.[8] These standards, in

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[7] These state court opinions discuss substantive rescue doctrine principles as a matter of state law. However, there is no basis for fashioning a distinctive maritime rescue doctrine. See discussion *infra* p. 10. Thus, federal and state rescue law is and should be the same. The Fourth Circuit must have agreed with this notion in *Furka I*, since it relied upon state court precedent in adopting its rule for judging conduct. 755 F.2d at 1088; App. 7. Indeed, this Court has previously found it appropriate to look to state law in developing general maritime law. *See* Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 584-88 (1974).

[8] If maritime rescuers are to be excused even for actions found unreasonable in the circumstances of the emergency, the Fourth Circuit seemingly would only condemn them for conduct of the type

effect, constitute a bold and unwarranted departure from traditional negligence principles. The potential for unwary courts to so depart in dealing with emergencies was foretold:

> There are, indeed, perils that in attempting to formulate such an "emergency doctrine" courts will lose sight of fundamental negligence principles. . . . The standard should, of course, be the objective standard of the reasonable person in the circumstances . . . , not the actor's best judgment. . . . Even when courts correctly sense that a case calls for the application of normal negligence principles the recognition of a separate "sudden emergency rule" invites the creation of patchwork exceptions that obscure the underlying coherence of applicable negligence theory.

3 F. Harper, F. James, O. Gray, *The Law of Torts* § 16.11, at 488 n.1 (2d ed. 1986) (citation omitted). The Fourth Circuit's tinkering with the rescue doctrine in a maritime setting in a fashion which effectively ignores the applicable traditional theories of negligence demands review by this Court.

II. The Decision Below Purports To Create A New And Unique Maritime Standard For Judging Perception Of The Need To Rescue Which Should Be Reviewed By This Court.

The extension of the wanton or reckless standard of *Furka I* to perception in *Furka II* signals a significant departure from well-established precedent. The Fourth Circuit purports to justify this departure by proclaiming that maritime rescuers are entitled to greater protection than their land-based counterparts. This flawed reasoning undermines the entire rescue doctrine and contravenes public policy.

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normally required to support an award for punitive damages. The Fourth Circuit indicated as much in *Furka I* by including some of the very same words —"wanton" and "reckless"—in describing the standard of care for conduct in a rescue situation, 755 F.2d at 1088, App. 6, and in specifying the level of behavior that would have been required to support a jury verdict for punitive damages against Great Lakes. *Id.* at 1091, App. 12.

A. *The Standard For Judging The Perception Of A Maritime Rescuer Raises Significant Policy Issues And Is An Important Question Of Federal Law Which Should Be Settled By This Court.*

1. *Maritime Rescues Are Not, In Principle, Different from Land-Based Rescues.*

Stripped of platitudes, the basic policy underlying the decisions below is either that admiralty jurisprudence requires more solicitude for maritime rescuers than is afforded their land-based counterparts[9] or that rescues on the water are inherently more dangerous than those on land. Although maritime rescue may involve great risk, countless examples could be recited of dangers encountered ashore which were just as deadly as any encountered on the water. Clearly no distinction exists between, for example, the quantum of danger faced by a rescuer who enters a burning building on land to save lives[10] and that encountered by an individual who sets out in stormy seas for the same purpose. Certainly, none was articulated by the Fourth Circuit. Such peril knows no shorelines. Regardless of setting, the actor's perception of the need for rescue and his conduct in any rescue attempt can and must be evaluated in light of what is reasonable under the particular circumstances. Since no relevant features distinguish maritime from non-maritime rescues, there is no basis for creating a uniquely maritime rescue doctrine.

2. *Furka II Protects Unreasonable Perceptions That Needlessly Endanger Others.*

Furthermore, in altering the perception standard in *Furka II*, the Fourth Circuit unwittingly extended the rescue doc-

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[9] This notion is deflated *infra*, pp. 12-13.

[10] See Altamuro v. Milner Hotel, Inc., 540 F. Supp. 870 (E.D. Pa. 1982).

trine beyond its salutory purpose[11] in a manner which undermines underlying negligence policy. Those who go to the rescue often are themselves subjected to peril. *See, e.g., Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921). Such peril not infrequently results in injury to the initial rescuer, which in turn may give rise to a need to rescue the rescuer. Thus, those who unreasonably attempt rescue may subject not only themselves, but also those who may later be called to come to their rescue, to grave peril merely by setting out.

Historically, maritime law has not protected those who act unreasonably. Indeed, comparative fault was the rule in maritime personal injury cases long before it gained momentum ashore. *See The Max Morris,* 137 U.S. 1 (1890). Because public policy strongly supports efforts to save life and limb, however, the law, whether maritime or land-based, has looked kindly upon those who go to the rescue. The prospect of saving life and limb is said to outweigh the danger to the class of rescuers, both original and secondary, even though it often involves the encountering of dangers which a reasonably prudent person would not encounter under normal circumstances.

That same policy cannot be said to encourage needless encounters with peril in situations where no one is actually in need of rescue and the circumstances are such that no reasonably prudent person would have thought that such a need existed. In those circumstances, the likelihood that the rescuer will suffer injury and that harm may also befall secondary rescuers renders culpable the initial rescuer's conduct. If this Court permits *Furka II* to stand, maritime law would become unique in protecting perceptions which not only are unreasonable under the circumstances but which

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[11] The rescue doctrine was developed to permit injured rescuers to overcome the bar of contributory negligence if their actions, though unreasonable under ordinary circumstances, were prudent in the face of the emergency.

also lead to conduct which can serve no beneficial purpose. Such perceptions and conduct are not worthy of encouragement or protection as a matter of public policy.

This case illustrates the point. Paul Furka set out on the Chesapeake Bay in a small boat to retrieve a scowman who was not actually in peril. When Furka himself needed rescue, three other co-workers set out in another small boat in an effort to save him. A. 490. Their boat also capsized, and only the fortuitous presence of another vessel nearby prevented their loss as well. A. 491. Those three other men would not have encountered potentially deadly peril on that occasion if Furka had not himself set out to retrieve the scowman. Public policy cannot be said to support Furka's actions if he proceeded based on an unreasonable perception that the scowman needed rescue.

B. *The Decision Below Erroneously Applies This Court's Traditional Deference Toward Seafaring Claimants To The Rescue Doctrine.*

Both decisions below rely heavily on selected language in *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970), that the law of admiralty should be "most hospitable to the impulses of man and law to save life and limb and property." *Id.* at 1021. Reliance upon that language to fashion a "maritime rescue doctrine," however, clearly conflicts with prior decisions of this Court. Although historically the Court has afforded seamen[12] a somewhat unique status, often referring to them as "ward[s] of the admiralty courts,"[13] *see, e.g., Warner v. Goltra*, 293 U.S. 155,162 (1934), this status has no application to the rescue doctrine.

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[12] In *Furka I*, Paul Furka was found to be a seaman for purposes of the Jones Act, 46 U.S.C. 688 (1982).

[13] Justice Story, then riding circuit, coined this phrase in his opinion in Harden v. Gordon, 11 F. Cas. 480, 485 (C.C. Me. 1823) (No. 6047).

The special benevolent status afforded seamen had its genesis in the notion of "the seaman as an illiterate, inexperienced, unthinking and imprudent individual who required the special protection of the Court." Norris, *The Seaman as Ward of the Admiralty,* 52 Mich. L. Rev. 479, 483 (1954). Deference was also afforded to seamen because of the many and unique perils experienced on long sea voyages. *Harden v. Gordon,* 11 F. Cas. 480 (C.C. Me. 1823) (No. 6047).

Here, however, none of the reasons advanced for affording seamen special status are present. Paul Furka was not on a long sea voyage at the time of his death. Quite to the contrary, he was working on a construction project in the Chesapeake Bay. Moreover, this case does not involve an illiterate and inexperienced individual. Paul Furka was in charge of a surveying team. *Furka I,* 755 F.2d at 1087; App. 4. He was hardly the type of individual for whom "ward of the court" status was created.

The Fourth Circuit's romanticized notion that maritime rescuers are somehow deserving of a different and more favorable standard thus is contrary to logic, significant public policy interests, and admiralty law as developed by this Court. It is an ill-conceived accretion to the federal maritime law that this Court should now jettison.

C. *The Decision Below Has Created Confusion In Maritime Rescue Cases.*

The misapplication of *Grigsby* in both *Furka I* and *II* has predictably led to analytical difficulty and a further split in the circuits. In *Berg v. Chevron U.S.A., Inc.,* 759 F.2d 1425 (9th Cir. 1985), the claimant was not the would-be rescuer, as in *Furka,* but was rather the victim and intended rescuee. The trial judge found that negligence of the rescuer had caused Berg's death. On appeal, the Ninth Circuit held that the rescuer could "be held liable [to the rescuee]

only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." *Id.* at 1430.

Unlike *Berg*, neither *Grigsby* nor *Furka* considered the liability of a rescuer to another person. Evaluation of the standard of care owed by a rescuer to the person in peril, as in *Berg*, may require the assessment of considerations entirely different from those surrounding the degree of care which a rescuer must use for his own protection, as in *Grigsby* and *Furka*. The mixing and cross-citation of these concepts reinforces petitioner's assertion that the standards of care in maritime rescues should be addressed by this Court.

III. The Fourth Circuit's Implicit Use Of Plain Error As The Basis For Overturning The Trial Court's Jury Instructions On Rescue Is A Significant Departure From Its Proper Role As An Appellate Court.

This case provides a textbook example of an appellate court using a doctrine of convenience—here the so-called "plain error" rule—to overstep the bounds of its authority in order to reach a desired result. Although plaintiff failed to request a rescue doctrine instruction in *Furka I* and in most circumstances would have been barred from raising the issue on appeal on the basis of Fed. R. Civ. P. 51, the Fourth Circuit invoked "plain error" to rescue her. 755 F.2d at 1089; App. 8-9. *Furka I* opined that the doctrine should be invoked "if the error is plain and to ignore it would result in a denial of fundamental justice . . . ." *Id.*, App. 8. *See also United States v. One 1971 Mercedes Benz,* 542 F.2d 912 (4th Cir. 1976). Significantly, in finding plain error, the Fourth Circuit failed to discuss maritime precedent that supported the jury charge. See *supra* pp. 6-7.

Furka II went much further. Although at the second trial Mrs. Furka once *again* failed to preserve properly for appeal the propriety of the jury instructions given on the rescue

doctrine, on appeal the Fourth Circuit chose this very issue as the basis for reversal, without any mention of Mrs. Furka's failure to comply with Rule 51. Clearly, however, even if implicitly invoked, the plain error doctrine had no place in *Furka II*.

The trial court's failure to charge the jury on the basis stated in *Furka II* could not be plain error, because the standard created by the panel is in direct conflict with all known precedent on the point.[14] The Fourth Circuit was unable to cite a single authority in support of its standard for judging perception. *Furka II*, 824 F.2d at 331, 332; App. 19, 20. Its decision to invoke plain error thus was wholly unwarranted. This Court should correct the Fourth Circuit's departure from proper appellate procedure, thereby avoiding a third trial in this case, which clearly is not required, and providing guidance on the proper application of the plain error doctrine.

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[14] *Furka II* acknowledges as much. 824 F.2d at 331; App. 19. See also authorities cited *supra* p. 8.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Fourth Circuit or, alternatively, the opinion below should be summarily reversed and harmonized with prior precedent.

Respectfully submitted,

WARREN B. DALY, JR.
1600 Maryland National Bank Bldg.
Baltimore, Maryland 21202
(301) 685-1120
Counsel for Petitioner

Diane Festino Schmitt
James E. Edwards, Jr.
Ober, Kaler, Grimes & Shriver
Of Counsel
December 3, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DEBORAH FURKA, Administatrix of the Estate of PAUL FURKA, Deceased	•	
v.	•	CIVIL NO. Y-82-1411
GREAT LAKES DREDGE & DOCK COMPANY, INC.	•	

• • • • • • • • • • • •

JUDGMENT

The above entitled case came before the Court, Honorable Joseph H. Young, presiding, and a Jury for the purpose of trial on February 15, 1983; on February 18, 1983, at the conclusion of the plaintiff's case in chief, a motion was made by defendant for Directed Verdict, and following argument of counsel for the respective parties said motion was granted by the Court as to punitive damages and denied by the Court in all other respects; on February 21, 1983, following the conclusion of all the evidence, argument of counsel and the Court's Charge to the Jury, the case was submitted to the Jury for its consideration, and after deliberating, the Jury returned its Verdict on February 22, 1983; it is, therefore, in accordance with the Verdict of the Jury and the Memorandum and Order of the Court dated May 6, 1983,

ORDERED AND ADJUDGED:

That Judgment be, and the same is, hereby entered in favor of plaintiff against defendant in the amount of Four Hundred Twenty Thousand Dollars ($420,000.00), and Costs.

Dated at Baltimore, Maryland this 6th day of May, 1983.

PAUL R. SCHLITZ, Clerk

BY: R. Bruce McElhone

R. Bruce McElhone
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1542

DEBORAH FURKA, Administratrix of the Estate of Paul Furka, deceased,

Appellant,

versus

Great Lakes Dredge & Dock Company, Inc.,

Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge. (C/A 82-1411)

Argued: December 5, 1984 Decided: February 26, 1985

Before RUSSEL, PHILLIPS and WILKINSON, Circuit Judges.

Leonard C. Jaques (The Jaques Admiralty Law Firm, P.C. on brief) for Appellant; Warren B. Daly, Jr. (M. Hamilton Whitman, Jr.; Ober, Kaler, Grimes & Shriver on brief) for Appellee.

WILKINSON, Circuit Judge:

This is an action brought for negligence under the Jones Act and for unseaworthiness under general maritime law involving an alleged rescue attempt by appellant's decedent of a fellow employee on the Chesapeake Bay. During that attempt, the would-be rescuer was swept by the waves from his boat and drowned. We hold that the trial court's failure to give a proper rescue charge to the jury constitutes plain error and requires reversal despite a failure of counsel to object to the charge in accordance with Fed.R.Civ.P. 51. We remand the case for a new trial in accordance with the guidelines set forth below.

Appellant Deborah Furka is the widow of Paul Furka ("Furka"), who was employed by appellee Great Lakes Dredge and Dock Company ("Great Lakes") as a surveyor on a large marine dike construction project at Hart and Miller Islands in the Chesapeake Bay near Baltimore. In addition to a hydraulic dredge and two crew boats, Great Lakes maintained a number of tugboats, scows, and Boston Whalers to perform various functions on and around the project. Furka was chief-of-party on a surveying team operating on a Boston Whaler.

On January 9, 1982, a day of increasingly rough weather and turbulent seas, one of the tugs, with scow attached, lost its rudder and its power and went adrift in the bay. The captain radioed to base, but exactly what he said is a matter of dispute. According to plaintiff, the message was a call to remove the scowman from his open boat, where he was cold and wet and "freezing to death." Defendant's evidence indicated that the captain suggested no emergency but merely requested assistance with moving the scow. At the time of the call, none of the larger boats was available to go to the disabled craft. Furka took his sixteen-foot Boston Whaler into the rough water to remove the scowman from the cold, but the stranded seaman refused to leave with him. Furka turned toward shore but shortly began taking on water. He radioed for help but was drowned before rescuers could reach him.[1]

[1] The tug captain and scowman were eventually picked up by the inspector's boat.

Furka's widow brought this action against his employer, alleging negligence under the Jones Act, 46 U.S.C. § 688 (1982) [2] and the unseaworthiness of the Boston Whaler under general maritime law.[3] Great Lakes denied any immediacy to the tugboat captain's radio call for help and asserted contributory negligence as a limitation upon complete recovery.[4]

The jury found Furka to have been a seaman. It returned a verdict in favor of plaintiff on negligence and against plaintiff on the unseaworthiness of the Boston Whaler. It awarded damages for pecuniary loss of $1,200,000, but found Furka to have been 65% contributorily negligent. Judgment was thus entered for plaintiff in the amount of $420,000. From that verdict Mrs. Furka appealed.

I

The submission to the jury of the question of Furka's contributory negligence without reference to the special context of rescue ignored the very premise upon which appellant's case was based. The instruction in this case failed to inform

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[2] 46 U.S.C. § 688(a) provides, in relevant part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury. . . ."

[3] General maritime law imposes a duty upon shipowners to provide seaworthy vessels – that is, vessels reasonably fit for their intended use. This duty extends to the vessel itself, its equipment, and its crew. It is an absolute duty requiring no knowledge on the part of the shipowner and exists independently of the duty to exercise reasonable care under the Jones Act. *See Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

[4] Contributory negligence may not be asserted as a complete bar to recovery under either the Jones Act or an action for unseaworthiness, though it may be taken into account to mitigate damages. *Socony-Vacuum Co. v. Smith*, 305 U.S. 424 (1939).

the jury that no contributory negligence may be inferred from a rescue attempt alone and further that no comparative fault may be assessed unless plaintiff's conduct was wanton or reckless.[5] As stated long ago by Justice Cardozo, "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore the reactions of the mind in tracing conduct to its consequences. It recognizes them as normal." *Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921).

The common law doctrine of rescue may be succintly stated: "[T]he law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness." *Scott v. John H. Hampshire, Inc.*, 246 Md. 204, 227 A.2d 751, 753-754 (1967), *quoting Maryland Steel Co. v. Marney*, 88 Md. 482, 42 A. 60, 66 (1898). *See also Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870 (E.D. Pa. 1982); *Brown v. National Oil Co.*, 233 S.C. 354, 105 S.E.2d 81 (1958); *Andrews v. Appalachian Electric Power Co.*, 192 Va. 150, 63 S.E.2d 750 (1951). When confronted with an emergency, a rescuer "should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. . . ." *Corbin v. Philadelphia*, 195 Pa. 461, 45 A. 1070, 1074 (1900); *see also Rodgers v. Carter*, 266 N.C. 564, 146 S.E.2d 810 (1966); Restatement (Second) of Torts § 470(1) (1965). In rescue, promptness may be prudence, and reflex may claim the seat of reason.

Whether or not there was a rescue attempt is, of course, a question for the jury. If the jury finds plaintiff engaged in a rescue, there must be evidence of wanton or reckless behavior on plaintiff's part before any fault may be assigned.

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[5] The trial court simply instructed the jury: "Contributory negligence is a failure on the part of the plaintiff himself to use ordinary care under the circumstances for his own safety at the time and place in question. . . . The law requires that Paul Furka use ordinary care for his own safety. Failure to do so would be negligence on his part. . . ."

This is the standard traditionally applied to the conduct of plaintiffs in rescue situations. *See, e.g., Scott v. John H. Hampshire, Inc.*, (standard of "dangerous but not reckless" behavior), 227 A.2d 751, 753, *citing Maryland Steel Co. v. Marney*, 42 A. 60, 66 ("rashness"); *Brown v. National Oil Co.* ("wanton or foolhardy"), 105 S.E.2d 81, 87; *Andrews v. Appalachian Electric Power Co.* ("rash" or "reckless"), 63 S.E.2d 750, 757; *Wagner v. International Ry.* ("wanton"), 133 N.E. 437, 438; *Corbin v. Philadelphia* ("rashness and imprudence"), 45 A. 1070, 1073.

We reject appellee's contention that these policies lose their force under the Jones Act, where the doctrine of comparative negligence applies damages proportionately. It is true that the "wanton and reckless" standard developed under the common law, where contributory negligence was a complete bar to recovery. In some comparative negligence jurisdictions, not in admiralty, the wanton and reckless standard has thus been diluted. *See e.g., Cords v. Anderson*, 80 Wis.2d 525, 259 N.W.2d 672, 683 (1977); *Ryder Truck Rental, Inc. v. Korte*, 357 S.2d 228 (Fla. App. 1978). We do not think that is the appropriate course here. Rather, we agree with the Fifth Circuit that "of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property." *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970). *See also Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980); *Asaro v. Parisi*, 297 F.2d 859 (1st Cir.), *cert. denied*, 370 U.S. 904 (1962). The best traditions of seafaring men demand that we honor attempts to rescue, unless the rescuer acts beyond the bounds that even the exigencies of the moment would allow. The wanton and reckless standard reflects the value society places upon rescue as much as any desire to avoid a total defeat of recovery under common law. Law must encourage an environment where human instinct is not insular but responds to the plight of another in peril.

This was a rescue attempt that ended in tragedy. Paul Furka died. If Sal Sanzone, the seaman on the open scow, had entered the Boston Whaler with Furka, he might have perished, too.

Some rescue attempts will involve the loss both of rescuer and victim. This does not displace the principles herein. Hazard inheres in the enterprise. A jury, assessing the situation at a time and place far removed, must give proper weight to the moment of peril and the humane instincts that prompted the response thereto.

II

Appellee contends that the trial court's contributory negligence charge is not subject to question here because appellant failed to object to the charge as given, pursuant to Fed.R.Civ.P. 51.[6] Ordinarily this court will not consider issues not previously raised. *United States v. One 1971 Mercedes Benz*, 542 F.2d 912 (4th Cir. 1976). However, if the error is "plain'" and to ignore it would result in a denial of fundamental justice, it should be corrected. *United States v. Barge Shamrock*, 635 F.2d 1108, 1111 (4th Cir. 1980), *cert. denied sub nom. Shell Oil Co. v. United States*, 454 U.S. 830 (1981). "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558 at 672-675 (1971).

In the case before us, the call to rescue and its attendant circumstances were the soul of appellant's case. Her evidence was adduced to show that had it not been for the perceived need for assistance, Furka would never have set out on the

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[6] Fed.R.Civ.P. 51 provides, in relevant part, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

turbulent bay in a sixteen-foot boat. Under the rescue doctrine, she was entitled to a special instruction regarding these circumstances. This court has found plain error requiring reversal where an instruction "plainly misstated fundamentally controlling substantive principles governing . . . [the] right to recover." *Miller v. Premier Corp.*, 608 F.2d 973, 983 (4th Cir. 1979); *see also Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967). The trial court's failure to give a special rescue instruction here amounted to such a misstatement.

Counsel's failure to request the instruction on rescue seems attributable to his erroneous belief that a contributory fault charge, even one modified by the rescue doctrine, did not belong in this case. Under such circumstances, the usual course is to charge counsel with error, not the district court. In those rare circumstances where an appellate court does find "plain error," it is not to excuse counsel's lack of knowledge or errors of judgment, but to encourage courts in their role as ministers of manifest justice in the case.

III

Appellant also raises for the first time on appeal the issue of unseaworthiness of the disabled tug and scow,[7] a claim based upon the tug's faulty rudder and loss of power, upon the lack of radio communication between the two boats, and upon the absence on either vessel of an anchor or a life-saving skiff. This question implicates a second prong of the rescue doctrine, *viz.*, that the violation of a duty to one who is

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[7] The significance of the ability to raise this claim is that a finding of unseaworthiness permits a plaintiff to recover in damages both pecuniary losses, including loss of support and funeral expenses, and nonpecuniary losses, notably loss of society. Under the Jones Act, only pecuniary losses (primarily loss of support and decedent's pain and suffering) are recoverable. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 587-591 (1974); *In re Merry Shipping*, 650 F.2d 622, 623-624 (5th Cir. 1981).

imperiled is also a violation of duty to the rescuer. *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870 (E.D. Pa. 1982); *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980); *Grigsby Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970); *Scott v. John H. Hampshire, Inc.*, 246 Md. 171, 227 A.2d 751 (1967); *Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921). While omission of this question from the instructions does not constitute "plain error" in the same way as the failure to mention the doctrine of rescue, this Rule 51 forfeiture need not work to appellant's detriment on remand, where the presence of reversible error already requires a new trial.

Appellee cannot cite any authority for its proposition that this second aspect of the rescue doctrine is "land based" law unrelated to the doctrine of unseaworthiness. In both *Hlodan* and *Grigsby* the rescuer's claim rested in part upon the unseaworthiness that created the need for a rescue. It is true, as appellee points out, that the *Grigsby* court stated there is no warranty of unseaworthiness to persons coming aboard a vessel because of the unseaworthy condition (i.e., repairmen and the like). 412 F.2d 1011, 1030. To state that this principle applies to a rescuer, however, is to vitiate the rescue doctrine, which the *Grigby* court declined to do. To the contrary, that court went on to find that the rescuer was a "seaman," entitled to a warranty of unseaworthiness on the vessel whose condition created the peril which prompted Grigsby to board for purposes of rescue.

IV

Appellant makes three other assignments of error pertaining to the trial court's instructions. As the case is to be retried, we will treat each point briefly. First, she points to the fact that assumption of risk is not a permissible defense in admiralty under either the Jones Act or an unseaworthiness claim, *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939), and that to mask an assumption of risk charge in the garb of contributory negligence constitutes reversible error. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981); *Tolar v.*

Kinsman Marine Transit Co., 618 F.2d 1193 (6th Cir. 1980); *Smith v. United States*, 336 F.2d 165 (4th Cir. 1964). In this case, the specific language singled out by appellant in the court's instructions is unobjectionable because it concerns Great Lakes' negligence, not Furka's. However, as the cases cited make clear, the line between contributory negligence and assumption of risk in a maritime setting is a fine one. "[T]he defense of contributory negligence requires evidence of some negligent act or omission by the plaintiff other than his knowledgeable acceptance of a dangerous condition." *Joyce v. Atlantic Richfield Co.*, 51 F.2d 676, 682-683, *citing Rivera v. Farrell Lines, Inc.*, 474 F.2d 255 (2d Cir.), *cert. denied*, 414 U.S. 822 (1973). Here a proper instruction on the rescue doctrine will assist in negating any inference of assumption of risk, but the trial court should take care to distinguish the concepts of "contributory negligence" and "assumption of risk" for the jury.

The trial court's instruction regarding the seaworthiness of the Boston Whaler was proper, though needlessly confused by negatives. In relevant part, the court charged:

> If you find that the defendant did not maintain the Boston Whaler at the dike for the purpose of missions such as the one that Paul Furka had embarked upon just prior to his death, *and* if you further find that he was not ordered to embark upon the mission, but rather that it was his own free choice to do so, then you must find that the Boston Whaler was not unseaworthy. (Emphasis added.)

Appellant objects that the clauses joined by "and" erect a "double hurdle" for the jury in order to find the Boston Whaler unseaworthy; appellee correctly discerns that any "double hurdle" extends to its position here. The jury found the boat to be seaworthy under an adequate instruction.

Finally, appellant assigns as error the trial court's directed verdict for defendant on the issue of punitive damages under her Jones Act claim. It is unclear whether punitive damages

are allowable under the Jones Act,[8] although they appear to be at least theoretically available under general maritime law.[9] We need not reach the issue, since the record contains no evidence to support a finding of "willfull" or "wanton" or "reckless" behavior on the part of Great Lakes that would be necessary to support any punitive damage award. *See e.g., In re Merry Shipping,* 650 F.2d 622 (5th Cir. 1981); *In re Marine Sulphur Queen,* 460 F.2d 89 (2d Cir.), *cert. denied,* 409 U.S. 982 (1972); *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970).

The case is reversed and remanded for further proceedings in accordance with our instructions.

REVERSED AND REMANDED.

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[8] Two circuit courts have specifically refused to reach the question. *In re Merry Shipping,* 650 F.2d 622 (5th Cir. 1981); *Phillip v. United States Line Co.,* 355 F.2d 25 (3d Cir. 1966). In a third case, the district court held punitive damages recoverable under the Jones Act and awarded them. The Sixth Circuit reversed on the facts without comment on the legal holding. The opinion is unclear as to whether the underlying cause of action on appeal was the Jones Act claim, the unseaworthines claim, or both. *Petition of Den Norske Amerikanje A/S,* 276 F. Supp. 163 (N.D. Ohio 1967), *rev'd sub nom. United States v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970).

[9] *See e.g., In re Merry Shipping* (specifically holding punitive damages recoverable under general maritime law "upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions," 650 F.2d 622, 623; *In re Marine Sulphur Queen,* 460 F.2d 89 (2d Cir.), *cert. denied,* 409 U.S. 982 (1972); *Renner v. Rockwell International Corp.,* 403 F. Supp. 849 (C.D. Cal. 1978). These cases cite general principles in *The Amiable Nancy,* 3 Wheat. 546 (1818), although, like Justice Story, none of them actually finds punitive damages appropriate in the situation at hand.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DEBORAH FURKA, Administratix of the estate of PAUL FURKA, deceased	*	
v.	*	CIVIL NO. JFM 82-1411
GREAT LAKES DREDGE & DOCK COMPANY, INC.	*	
Filed: June 12, 1985	*	

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is hereby entered in favor of Defendant against Plaintiff.

June 12, 1986
Date

/s/ J. FREDERICK MOTZ
J. Frederick Motz
U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(301) 962-0782
FTS 922-0782

August 28, 1986

MEMORANDUM TO COUNSEL RE:
Furka v. Great Lakes Dredge &
Dock Co.
Civil No. JFM-82-1411

Dear Counsel:

I have reviewed your letters of August 12, 1986, August 18, 1986 and August 21, 1986.

In light of the position stated by Mr. Jaques, I will take no action to request that the case be remanded for the purpose of entering judgment in favor of plaintiff in the amount of $420,000. However, I agree with Mr. Daly that the judgment should so state in order to protect the rights of Mrs. Furka. By a copy of the letter to the Court Clerk, I am requesting that he supplement the record on appeal to include this letter (as well as your exchange of correspondence) to avoid any confusion on the point. In the event that the case is affirmed on appeal, the judgment should be in Mrs. Furka's favor for $420,000.

Let me add finally that there was absolutely nothing improper in Mr. Daly writing to me as he did on August 12, 1986. Indeed, he did so for the purpose of protecting the rights of an opposing party. I regret that in his August

18th letter Mr. Jaques saw fit to take Mr. Daly to task for his highly professional conduct.

Very truly yours,

/s/ J. FREDERICK MOTZ

J. Frederick Motz
United States District Judge

cc: Joseph A. Haas,
Clerk U.S. District Court
(w/enclosures)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1173

DEBORAH FURKA, Administratrix of the Estate of Paul Furka, Deceased,
Plaintiff-Appellant,

versus

GREAT LAKES DREDGE AND DOCK COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-82-1411-JFM).

Argued: February 2, 1987 Decided: August 4, 1987

Before RUSSELL, PHILLIPS and WILKINSON, Circuit Judges.

Leonard C. Jaques for Appellant; Roann Nichols (Warren B. Daly, Jr.; Ober, Kaler, Grimes & Shriver on brief) for Appellee.

WILKINSON, Circuit Judge:

Deborah Furka brought suit under Jones Act against the Great Lakes Dredge and Dock Company after her husband died in an attempt to aid a fellow seaman. She won a jury verdict, but the $1,200,000 damage award was reduced to $420,000 because the jury found that Furka was 65% contributorily negligent. In *Furka v. Great Lakes Dredge and Dock Company*, 755 F.2d 1085 (4th Cir. 1985) (*Furka I*), this court ordered a new trial on the ground that the trial court failed to properly instruct the jury on the doctrine of rescue. At the second trial, the trial court instructed the jury that the decedent was not at fault if he believed that a rescue was required and if a reasonably prudent person would have perceived the need for a rescue. Because we believe that the trial court erroneously applied a reasonable person standard in a maritime rescue situation, we again reverse and remand for a new trial.

I.

The facts in this case are set forth in *Furka I*. There, this court held that the trial court's jury instruction on contributory negligence "without reference to the special context of rescue" was plain error. 755 F.2d at 1088. We stated that contributory negligence could be inferred only where plaintiff's conduct in attempting the rescue was wanton and reckless. At the second trial, the parties agreed to a special verdict form which put two questions before the jury. The first question was whether a rescue situation existed in this case. If a rescue situation was found, the jury was then to consider whether Furka's conduct during the rescue was reckless or wanton. If no rescue situation existed, however, the *Furka I* jury's finding that the decedent was 65% contributorily negligent and the reduced damage award of $420,000 would be adopted.

At the second trial, the trial judge instructed the jury that:

> In determining whether a rescue situation arose in this case, you shall consider the following: 1) did Mr. Furka perceive the need for a rescue? and 2) if so, was there cause based on all the surrounding circumstances for a reasonably prudent person to have perceived the call to rescue and thereby launch the effort of the attempt?

During its deliberations, the jury sent the court a note asking "[c]ould we please have the definition of rescue as it pertains to this case again? What subjective and objective conditions needed to be present?" The court reinstructed the jury as set forth above. The jury then answered the first special verdict question in the negative, finding that a rescue situation did not exist.

Furka contends that the trial court erred in instructing the jury to consider whether a reasonably prudent person would have perceived the need for a rescue. She asserts that, after *Furka I*, the correct inquiry is whether the decedent acted wantonly and recklessly both in perceiving the need for and in attempting the rescue. Great Lakes concedes that Furka's conduct during the rescue must be evaluated under a wanton and reckless standard, but argues that his perception of the need for a rescue should be measured against that of a reasonbly prudent person. We believe that to bifurcate the rescue doctrine in this way is to trivialize it. We thus reverse and remand for another trial.

II.

In this case, the trial judge correctly instructed the jury that Furka's actions in attempting the rescue must be evaluated under the wanton and reckless standard. He erred, however, in instructing the jury to determine

whether a reasonably prudent person would have perceived the need for a rescue. Great Lakes cites numerous cases in which the courts have applied a reasonable person standard to evaluate perception and a wanton and reckless standard to evaluate conduct during the rescue. *See*, e.g., *Marks v. Wagner*, 52 Ohio App. 2d 320, 370 N.E.2d 480, 483 (1977); *Wolff v. Light*, 169 N.W.2d 93, 97 (N.D. 1969); *Ellmaker v. Goodyear Tire & Rubber Co.*, 372 S.W.2d 650, 658 (Mo. App. 1963). Because we believe that perception and action cannot be neatly separated in maritime rescue situations, we decline to evaluate them by different standards.

The wanton and reckless standard arose at common law in recognition of the fact that one may be driven to acts during a rescue attempt that would not befit a reasonably prudent person. Rescue springs more from the impulse to aid than from any process of thought or measure of reflection. The wanton and reckless standard aims to encourage the impulse to assist. The law will not deter rescuers by charging them "with the consequences of errors of judgment resulting from the excitment and confusion of the moment." *Corbin v. Philadelphia*, 195 Pa. 461, 45 A. 1070, 1074 (1900).

In *Furka I*, this court noted that the wanton and reckless standard was particularly applicable to maritime rescue attempts because "of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property." *Furka I*, 755 F.2d at 1089, *quoting Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021 (5th Cir. 1969). The court sought to conform the standards of maritime recovery to the dangers inherent in maritime work. It declined to impute negligence to those whose efforts reflect "the best traditions of seafaring men." *Furka I* at 1089.

We believe that the maritime rescuer's perception of the need for immediate action must be evaluated under the same wanton and reckless standard. In rescue situations, perception and response are inextricably linked. The same standard governing conduct that saves the lives of seamen must apply to the perception that generates the act. By definition, the perception of danger requiring prompt action is formed under the same stress and on the same imperfect information as the rescue itself. If rescuers will not be charged with the simple negligence of their acts "in the excitement and confusion of the moment," it is anomalous to charge them with a failure to prudently verify that immediate action is necessary. *See Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921) (in the rescue context, "the law does not ignore the reactions of the mind in tracing conduct to its consequences. It recognizes them as normal.")

Furka's course of conduct was continuous. To subject one part of it to a negligence standard and another to a wanton and reckless standard is to have angels dancing again on the head of the proverbial pin. Unless the perception and the act of rescue are foolhardy, negligence will not be imputed. We hold that, in admiralty, the correct standard is whether the rescuer was wanton and reckless both in perceiving the need for a rescue and in undertaking it.

The instruction failed to reflect the standard set forth in *Furka* I. We reverse the judgment below and remand for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1173

Filed September 4, 1987

Deborah Furka,

Appellant,

versus

Great Lakes Dredge & Dock Company,

Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Russell and Judge Phillips.

For the Court,

/s/ JOHN M. GREACEN
Clerk